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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KENNETH DANIEL BRICE, Defendant and Appellant.	B284251 (Los Angeles County Super. Ct. No. BA437891)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed.

Juliana Drous, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

At his trial for murder, Kenneth Brice, Jr., (defendant) tried to introduce expert testimony about the "fight or flight" response to a stressful situation, here, a fight during which defendant stabbed the victim. The trial court excluded the testimony. Nonetheless, the jury found defendant guilty of the lesser offense of voluntary manslaughter. Defendant appeals, contending the court erred by excluding the evidence. He also contends the court improperly instructed the jury regarding consciousness of guilt based on flight, because he went home after stabbing the victim. We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Prosecution case

On July 4, 2015, Anthony Raffaele and his father Monte Scott Raffaele were arguing with each other outside of defendant's house.[1] Defendant and his father Kenneth Brice, Sr., approached them, and the four men got into a physical altercation during which Monte sprayed mace into defendant's face. Defendant left and returned with a knife, stabbing Monte to death.

A neighbor saw the Raffaeles shouting and laughing outside. A bit later, she saw the Brices and the Raffaeles having a "disagreement." The neighbor saw Anthony spray Kenneth, Sr., and defendant with pepper spray. Defendant dropped to one knee, and Kenneth, Sr., backed away. The Brices then went back toward their house, and the Raffaeles walked toward Figueroa. Minutes later, defendant and his father, along with their two

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[1] To avoid confusion, we refer to certain witnesses and parties by their first names.

dogs, followed the Raffaeles. Other witnesses saw defendant kicking a man on the ground.

Ten minutes after the attack, defendant and his father returned home. Police officers went to the Brices' house and ordered everyone inside to come out. Kenneth, Sr., came out 15 to 20 minutes later, but defendant did not comply until two hours later.

Monte died from multiple stab wounds.

II. Defendant and Kenneth, Sr.'s, testimony

Defendant and his father testified for the defense. According to Kenneth, Sr., he and defendant asked the Raffaeles to quiet down, but Anthony said, " 'F you,' " to defendant. When defendant said he was going to call the police, Anthony shot him in the eye with pepper spray, making defendant's eye bleed. The Raffaeles ran with defendant in pursuit. Kenneth, Sr., let his dogs out and ran after all of them. When Kenneth, Sr., caught up to them, defendant and Monte were fighting Kenneth, Sr., pulled Anthony off of his son but he didn't see much of the fight and never saw a knife. After the fight, defendant and Kenneth, Sr., went home. When Kenneth, Sr., talked to the police about the incident, he lied about having knowledge of defendant's knife collection.

Defendant testified that after he told the Raffaeles he was going to call the police, Monte sprayed him with pepper spray. Defendant froze for a moment, and, when he saw the Raffaeles run, he "instinctively" chased them. When he caught up to them, Anthony swung at defendant, who pushed him to the ground. Monte tried to spray defendant and came at defendant with a knife, which defendant slapped away. The knife fell to the ground, and defendant and Monte struggled over it. Feeling he

had no other way to get Monte to stop and in order to protect himself, defendant stabbed Monte. He went home, washed the clothes he was wearing, and went to sleep.

II. Verdict and sentence

A jury found defendant not guilty of murder but guilty of voluntary manslaughter (Pen. Code, § 192, subd. (a)).[2] The jury found true a personal use of a weapon allegation (§ 12022, subd. (b)(1)).

On July 19, 2017, the trial court sentenced defendant to the midterm of six years plus one year for the weapon enhancement, for a total of seven years in prison.

DISCUSSION

I. Exclusion of expert testimony about "fight or flight" response

Defendant contends the trial court abused its discretion by excluding Dr. Ronald Markman's testimony about the fight or flight response to threats. After setting forth additional facts, we conclude the court did not abuse its discretion.

A. *Dr. Markman's proposed testimony*

The defense offered that Dr. Markman would testify about the psychological effect of being shot in the eye with pepper spray. At a hearing pursuant to Evidence Code section 402, Dr. Markman testified that he is a psychiatrist. According to him, the spectrum of responsive behaviors includes fight or flight. Fight or flight is not a mental disorder but rather "an impulsive,

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

thoughtless behavior under most circumstances, because fight or flight suggests that the person feels that he's under duress or under risk of being injured or even killed." While a person under such a risk is capable of rational thought, he may set it aside due to the threat presented.

To determine whether a person acted pursuant to the fight or flight response, Dr. Markman evaluates the individual and his or her history. In this case, the doctor reviewed reports related to defendant's arrest and performed a psychological test on defendant to assess whether his behavior may have resulted from a fight or flight reaction. The test has a validity scale of three sections and a clinical scale of 10 sections. Defendant was within normal limits on the clinical scales, but he was borderline on the "depressive scale," which could reflect the influence of the fight or flight phenomenon but could also have resulted from the depressive effects of the legal proceedings.

Also, adrenaline is released in emotional situations, and such a stimulant can make a person behave irresponsibly. However, adrenaline does not diminish someone's capacity to make a decision. In Dr. Markman's opinion, defendant acted impulsively and not deliberately—"he thought to act to do what he did, but he didn't take into consideration what that behavior would involve or what it would lead to."

Dr. Markman agreed that defendant did not suffer from a long-term mental disease, defect or disorder. Instead, defendant responded to an acute situation. The doctor believed that defendant had a "short-term disorder" that ended once the victim was killed.

B. *The trial court's ruling*

In ruling on whether to admit Dr. Markman's testimony, the trial court pointed out that diminished capacity was not relevant to the extent it affected defendant's ability to form a particular intent or mental state (§ 25) and that evidence of a mental disease, mental defect or mental disorder is inadmissible to show or to negate capacity to form any mental state. Although the court agreed it was "within the province of relevant evidence that a person confronted with a situation could react in a given way," the court did not think any evidence had been presented that defendant was "confronted with any kind of situation." Rather, as the court understood Dr. Markman's testimony, he did *not* say that somebody hit in the eye will exhibit an acute mental disease, defect or disorder: "He didn't say that. He said he based it on a whole host of things, including the fact that [defendant] was confronted with somebody pointing a knife at him. There's no evidence of that right now."

Further, the trial court was unconvinced it was beyond the common knowledge of laypeople that somebody confronted with a combative situation might run away or fight. In the absence of evidence that fight or flight was a "mental syndrome" rather than a "common reaction," "[w]hat's a psychiatrist going to add to that?" The trial court therefore found that Dr. Markman could not testify, although the court agreed to revisit the issue if additional testimony came in.

After Kenneth, Sr., testified but before defendant testified counsel again argued that Dr. Markman should be allowed to

testify.[3] The court repeated that its primary reason for disallowing the evidence was "there's no evidence upon which [Dr. Markman's] testimony is relevant. So if and when there is evidence upon which his testimony is relevant, I believe I said I would revisit the issue." Defense counsel clarified that the court would revisit the issue after more testimony, and the court agreed: "I'll revisit the issue." Counsel did not, however, raise the issue again, except in a new trial motion, which the court denied.[4]

C. *The court did not abuse its discretion*

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) An expert witness may offer such relevant evidence. That is, a matter may be the subject of expert testimony "if it is 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' That is not to say, however, that the jury need be wholly ignorant of the subject matter of the expert opinion in order for it to be admissible. [Citation.] Rather, expert opinion testimony ' "will be excluded only when it would add *nothing at*

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[3] The defense also moved to dismiss because it was "obvious" the evidence was admissible under section 28.

[4] In denying the new trial motion, the court said that the relevance of the doctor's testimony depended on defendant's testimony. However, nothing that defendant said rendered the expert testimony relevant. Also, defense counsel failed to renew her request after defendant testified. Finally, all the evidence would have done is provide support for reducing the charge to voluntary manslaughter.

all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.' " ' " (*People v. Jones* (2012) 54 Cal.4th 1, 60.) A trial court has discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability its admission will create a substantial danger of undue prejudice, confusing the issues or misleading the jury. (Evid. Code, § 352.) We review a trial court's ruling on evidentiary matters, including whether to admit or to exclude expert testimony, for abuse of discretion. (*People v. Jones* (2013) 57 Cal.4th 899, 946.)

The trial court here did not abuse its discretion. First, defendant has failed to show he was precluded from presenting the evidence. The court did initially rule at the Evidence Code section 402 hearing that the testimony could not come in. But, the court also said at that hearing it would reconsider the issue if an appropriate offer of proof was made. Counsel renewed the request after Kenneth, Sr., testified, and the court again denied it. Even so, the court reiterated its willingness to revisit the issue on a proper showing. Defense counsel thereafter failed to renew the motion after defendant testified. We therefore could consider the issue forfeited. (See *People v. Lewis* (2008) 43 Cal.4th 415, 481 [failure to press for ruling on motion to exclude evidence forfeits appellate review of claim because failure deprives trial court opportunity to correct potential error]; *People v. Anderson* (2001) 25 Cal.4th 543, 580–581.)

Second, and assuming the issue was preserved, there was insufficient evidence to support the proposed testimony. As described by Dr. Markman, fight or flight is a response to a stressful situation. Stated otherwise, when a person is

threatened, the person will confront the threat or run from it. However, Dr. Markman did not say the fight or flight response applies when the person *pursues* the threat. In fact, the doctor suggested the opposite is true. He said a "time sequence delay" "might not apply to fight or flight." And, if someone "gets away" from a threatening situation "but then during a period of, quote, 'safety,' decides, hey, I don't want to do that, I want to go get that guy" "that doesn't become a fight or flight phenomenon. That becomes a thoughtful decision." The state of the evidence at the time of the evidentiary hearing was that after defendant's first encounter with the Raffaeles, he left, returned with a knife, and pursued them. The trial court therefore correctly found there was no evidence to support the proposed testimony. Defense counsel did renew the motion after Kenneth, Sr., testified, but he too testified that defendant pursued the Raffaeles. Kenneth, Sr., also denied seeing a knife. And, to the extent the state of the evidence changed after defendant testified that, after being pepper sprayed and seeing the Raffaeles run away, he instinctively chased them, defendant did not renew his motion at that time.

In any event, even if Dr. Markman's testimony was minimally relevant to defendant's defense of perfect self-defense, the trial court did not abuse its discretion by excluding it under Evidence Code section 352. The proposed testimony was within the scope of an ordinary person's common knowledge and experience. (*People v. Jones*, *supra*, 54 Cal.4th at p. 60.) That there are responsive behaviors to stressful situations, including fight or flight, is unremarkable. Also, the essence of Dr. Markman's proposed testimony was otherwise introduced. There was ample evidence defendant was involved in a stressful

situation that could provoke a fight or flight response. Defendant testified the Raffaeles attacked him, and he then pursued and stabbed Monte during a struggle over a knife. Kenneth, Sr., also testified about the events leading to the stabbing. Further, defendant testified that he acted instinctively. Defendant therefore presented the defense that he responded to a stressful situation by fighting. Because defendant was not precluded from presenting that defense, any error did not rise to the magnitude of federal constitutional error. (See generally *People v. Abilez* (2007) 41 Cal.4th 472, 503; *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 756 [routine application of state Evidence Code law reviewed under *People v. Watson* (1956) 46 Cal.2d 818].)

II. Instructional error

Defendant next contends the trial court erred by instructing the jury on consciousness of guilt based on flight because he merely returned home after stabbing Monte.[5] We disagree.

A flight instruction is proper where evidence suggests the defendant's motivation for leaving a crime scene was consciousness of guilt. (*People v. Boyce* (2014) 59 Cal.4th 672, 690.) But, merely being at a crime scene and leaving will not justify a flight instruction, because a person may be unaware a crime has occurred or may leave for reasons rather than to avoid

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[5] The flight instruction stated: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself." (CALCRIM No. 372.)

arrest or observation. (*Ibid.*; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1244.)

Here, there was evidence defendant did not just leave the crime scene and go home. Instead, defendant had a violent altercation with the Raffaeles in which he was injured and during which he stabbed Monte. Yet, he and his father left the scene and did not call for help. This conduct raised an inference defendant left to avoid apprehension. (See, e.g., *People v. Bonilla* (2007) 41 Cal.4th 313, 329.) That he went to his nearby home did not negate the inference. Rather, when officers went to defendant's house, it took hours for him to respond to their order to come outside—though his father complied within 15 to 20 minutes of being told to do so. Although defendant explained that he simply changed his clothes and fell asleep after returning home, another reasonable interpretation of the evidence was that he was hiding himself and relevant evidence, which further buttressed the inference he fled the scene to avoid detection.

III. Cumulative error

Defendant contends that the cumulative effect of the purported errors requires reversal. As we have found no errors to accumulate, we reject this cumulative error claim. (See generally *People v. Woodruff* (2018) 5 Cal.5th 697, 783; *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 499.)

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED

DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.